Supreme Court, U.S.
FILED

(1)

95-217 AUG 7 - 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

CAROL WITTY,

Petitioner,

v.

HEWLETT - PACKARD COLORADO, INC., aka Hewlett - Packard, a California corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Whether filing a Notice of Appeal one business day after the filing deadline mandates a finding of "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate Procedure, where the delay is caused by an uncontrollable delay in mail delivery, the appellant acts in good faith, the appellee has actual notice of the appeal before the deadline, and the delay does not adversely impact administration of the case.

2. Whether interpreting "excusable neglect" to exclude reliance on the United States mail to deliver a notice of appeal in a timely fashion abrogates the standard of "excusable neglect" under Rule 4(a)(5) of the Federal Rules of Appellate Procedure.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

CAROL WITTY, Petitioner,

v.

HEWLETT-PACKARD COLORADO, INC., aka Hewlett-Packard, a California corporation, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner Carol Witty respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on May 9, 1995.

OPINIONS BELOW

The order of the Court of Appeals for the Tenth Circuit, denying petitioner's ("Ms. Witty") petition for rehearing, has not been reported. It is reprinted in the appendix hereto, p. 1a, *infra*. The order and judgment of the Court of Appeals for the Tenth Circuit, affirming the orders of the United Stated District Court for the District

of Colorado is an unpublished opinion reported at 51 F.3d 287, 1995 WL 125540 (10th Cir. (Colo.)). It is reprinted in the appendix hereto, p. 3a, *infra*.

The order of the United States District Court for the District of Colorado (Sparr, D.J.), denying Ms. Witty's motion to reconsider, has not been reported. It is reprinted in the appendix hereto, p. 7a, *infra*. The order of the United States District Court for the District of Colorado (Sparr, D.J.), denying Ms. Witty's motion for extension of time to file an appeal, has not been reported. It is reprinted in the appendix hereto, p. 13a, *infra*. The order of the United States District Court for the District of Colorado (Sparr, D.J.), granting respondent's ("Hewlett-Packard") summary judgment motion, has not been reported. It is reprinted in the appendix hereto, p. 18a, *infra*.

JURISDICTION

The Tenth Circuit Court of Appeals entered a judgment and an opinion affirming the Colorado District's orders on March 14, 1995. A petition for rehearing was denied on May 9, 1995.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

F.R.A.P. 4(a)(5). *Appeals in Civil Cases.*

The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

STATEMENT OF THE CASE

On September 29, 1993, the district court entered summary judgment in favor of Hewlett-Packard on all of Ms. Witty's claims relating to Hewlett-Packard's termination of her employment.[1] After judgment entered, Ms. Witty investigated her financial resources to determine whether she could afford to bring an appeal. On Monday, October 25, 1993, Ms. Witty informed her counsel that she had obtained financing and wished to proceed with the appeal, and her counsel verified that the Notice of Appeal was due by Friday, October 29, 1993. On that same date, Monday, October 25, 1993, four full days before the deadline, counsel for Ms. Witty deposited the Notice of Appeal in the United States mail, first-class postage prepaid. At the same time, copies were mailed to Hewlett-Packard's counsel, Gibson, Dunn & Crutcher in Denver, and to Ms. Witty at her home address in Fort Collins, Colorado.

By the morning of Tuesday, November 2, 1993, Ms. Witty's counsel had not yet received documentation from the Court of Appeals acknowledging receipt of the appeal, and telephoned the district court clerk's office to inquire about the delay. The clerk informed counsel that the appeal had been docketed on Monday, November 1, 1993, one business day *after* the Friday, October 29 deadline. The clerk's office, located in downtown Denver, Colorado,

[1] The District Court had jurisdiction under 28 §§ 1332, 1441, and 1446.

and less than two miles from Ms. Witty's counsel's office, had no knowledge as to why the Notice had been docketed a full seven days after its mailing from a Denver, Colorado post office. The clerk's office of the Tenth Circuit Court of Appeals was also unable to verify whether the Notice had been initially misrouted to their office.

Hewlett-Packard's counsel confirmed receipt of the Notice of Appeal in its Denver office, located one block adjacent to the United States District courthouse, on Wednesday, October 27, 1993, two days before the deadline. Ms. Witty also confirmed that she received the Notice of Appeal two days before the deadline at her Fort Collins address, located approximately seventy (70) miles from downtown Denver. Ms. Witty's envelope displays the metered imprint of Monday, October 25, 1993 and postmark of Tuesday, October 26, 1993.

Counsel for Ms. Witty moved immediately for a *nunc pro tunc* extension of one business day's time to file the notice of appeal.[2] The district court denied the extension, see p. 13a, *infra*, finding that the delay in the mail did not constitute excusable neglect. Ms. Witty then filed a Motion to Reconsider. Upon reconsideration, the

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[2] Ms. Witty appealed the summary judgment granted to Hewlett-Packard because the district court failed to adequately consider evidence presented by Ms. Witty. Furthermore, the court departed from established decisional Colorado law and applied Michigan law, on the mere speculation that Colorado might one day adopt Michigan law.

district court affirmed its denial of the retroactive one-day extension. See p. 7a, *infra*. Ms. Witty appealed the denial of the extension of time to the Court of Appeals for the Tenth Circuit and on March 14, 1994, following oral argument, the Tenth Circuit panel entered an order and judgment affirming the district court's denial of extension to file the appeal, and dismissed Ms. Witty's appeal on the merits due to lack of jurisdiction. See p. 3a, *infra*. A petition for rehearing was denied on May 9, 1995. See p. 1a, *infra*.

REASONS FOR GRANTING THE WRIT

I.

Federal Courts of Appeals have established conflicting rules regarding the interpretation and application of the Rule 4(a)(5) of the Federal Rules of Appellate Procedure "excusable neglect" standard.

Rule 4(a)(5) of the Federal Rules of Appellate Procedure ("F.R.A.P.") permits an extension of time to file a notice of appeal upon a showing of excusable neglect. The standard for determining whether "excusable neglect" has been demonstrated is an equitable one that requires a consideration of the particular facts and circumstances of each case. In *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. ___, 113 S.Ct. 1489, 1495 (1993), the Court cited to F.R.A.P. 4(a)(5) in support of its adoption of a flexible, case-by-case standard for excusable neglect with respect to

extensions for filing bankruptcy claims under Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure. In *Pioneer*, the Court analyzed various circuits' interpretations of F.R.A.P. 4(a)(5), and described the conflict in the courts of appeals regarding what is necessary to meet the excusable neglect standard. *Id.* at 1494, n.3. The Court emphasized that the excusable neglect standard is "at bottom, an equitable one, taking account of all relevant circumstances that surround the party's omission." *Id.* at 1498. Circumstances to be considered include the danger of prejudice to the opposing party, the length of the delay and its potential impact on proceedings, and the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Id.*

Findings of excusable neglect due to unpredictable and uncontrollable delays in the delivery of mail are abundant and motions for extension of time to file an appeal have been granted on this basis in the U.S. Courts of Appeals for the First Circuit, the Second Circuit, the Third Circuit, the Fifth Circuit, the Tenth Circuit, and the Eleventh Circuit. Furthermore, the case law of the Eighth Circuit Court indicates that it, too, would likely find excusable neglect under the facts of the instant case. To Ms. Witty's knowledge, the remainder of the circuits have not addressed this issue.

The most recent case on this issue is *U.S. v. Carson*, 52 F.3d 1173 (2nd Cir. 1995). The appellants mailed their Notice of Appeal in what they anticipated as being ample time to reach the clerk's office, but it was received one day after the deadline. The appellants moved for an extension of time to file their already late appeal pursuant to F.R.A.P. 4(a)(5). After considering each of the factors identified by the Court in *Pioneer*, a finding of excusable neglect due to an uncontrollable delay in mail delivery was made and subsequently upheld.

The First Circuit followed similar reasoning in two cases. In *U.S. v. Twomey*, 845 F.2d 1132 (1st Cir. 1988), counsel for appellant mailed the notice of appeal from his office located two blocks from the courthouse five days before the filing deadline. The notice was not received and docketed until one day after the deadline. The appeals court ordered the district court to treat the notice as a motion for extension of time because "it is perfectly plain that the delayed filing eventuated from the delinquency of the postal service and/or court personnel." *Id.* at 1134. The court further noted that counsel had acted diligently and that it was not inexcusable for counsel to mail the notice instead of filing it in person. *Id.* Likewise, in *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir. 1986), the court found that a three mile delivery of a notice of appeal to the courthouse warranted an extension of time. The court held that "there was no mistake by counsel, excusable or otherwise. Rather, there was excusable neglect by the Post Office to take more than five days (even though this included a weekend) to transmit an adequately addressed

letter three miles, and no basis for charging counsel for failing to think that more might be needed." *Id.* at 301.

The Third Circuit has recognized this principle in reviewing the decision of a district court that had denied an extension of time for filing a notice of appeal under F.R.A.P. 4(a)(5) in *Ramseur v. Beyer*, 921 F.2d 504 (3rd Cir. 1990). In *Ramseur*, counsel for appellant mailed the notice of appeal six days before the deadline. The notice was mailed from counsel's office, which was less than five miles away from the courthouse. For some unexplained reason, the notice did not reach the courthouse until thirteen days later, a full seven days after the deadline. Finding that the delay constituted excusable neglect, the court reasoned that:

> Because his notice of appeal was filed only seven days late, granting [appellant] an extension does not raise overall fairness concerns. More importantly, the delay was not attributable to counsel's bad faith. Rather, [appellant's] notice of appeal was untimely despite counsel's diligent efforts at compliance. By mailing the notice of appeal on April 10th, [appellant's] counsel reasonably believed that it would be filed within the 30 day time period. Further, counsel, upon leaning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5) *Id.* at 506.

The Fifth Circuit placed its seal of approval on this principle for establishing excusable neglect in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (5th Cir. 1980). In

reversing a finding by the district court of no excusable neglect, the court noted that two days were allowed for the mailing of the notice of appeal, when delivery would normally have taken one day. The notice took three days to get to the courthouse, or three times the normal time for delivery. The court held that the notice was timely filed. *See also Sanchez v. Bd. of Regents of Texas Southern Univ.*, 625 F.2d 521, 522 (5th Cir. 1980) (holding that reliance on normal course of delivery of mail is reasonable and basis for excusable neglect where notice mailed two days before deadline, but not received by court until two days after deadline).

The Tenth Circuit Court of Appeals has also ruled on the issue of untimely filings due to mail delays under facts very similar to the case at hand, and held that reliance on the United States Postal Service to deliver mail in a timely fashion is excusable neglect. *See Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1863 n.3 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2996 (1992). The *Tarabishi* court upheld a finding of excusable neglect due to postal delay. The appellants mailed their Notice of Appeal three days before it was due, but it arrived one day late. The court based its finding of excusable neglect, in part, on the fact that in the ordinary course of events, mail service would have taken only two days.[3]

[3] Ms. Witty notes that under the doctrine of *stare decisis*, in the absence of a contrary Supreme Court decision, the decisions of a Court of Appeals are binding on the district courts in its circuit for the (continued)

The Eleventh Circuit also ruled that good faith reliance on the Postal Service constitutes excusable neglect under F.R.A.P. 4(a)(5). In *Wright v. Deyton*, 757 F.2d 1253 (11th Cir. 1985), a delay in the mail caused a notice of appeal to be received more than two weeks after the deadline. The court, in ruling that an extension of time was warranted, noted that the notice was postmarked several days before the deadline, that appellee's counsel received a copy of the notice before the deadline, and that in the ordinary course of mail delivery, the notice would have arrived in the clerk's office before the deadline. *Id.* at 1254.

The Eighth Circuit considered the question of what constitutes excusable neglect for purposes of filing timely notice in *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427 (8th Cir. 1990). In *Vogelsang*, appellant allegedly mailed notice of appeal prior to the filing deadline, but it was never received by the clerk's office. Furthermore, counsel for appellant did not attempt to ascertain that the notice of appeal had been received by the clerk until several weeks after the deadline. In rejecting appellant's request for an extension of time, the court noted that counsel for appellant made no claim that the U.S. Mail, rather than his

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(continued) propositions which it decides. *In Re Barakat*, 173 B.R. 672(Bktcy C.D.Cal. 1994). Even if circuits are split on an issue, the district court is bound to its Circuit's precedent. *See Morris v. State of Kan. Dept. of Revenue*, 849 F.Supp. 1421, 1428 (D.Kan. 1994); *U.S. v. Spedalieri*, 910 F.2d 707, 709 (10th Cir. 1990).

own clerical error, was responsible for the non-delivery of the notice, nor was there any way to verify that the notice of appeal had, in fact, been placed in a properly addressed, stamped envelope and mailed in time to arrive before the deadline. The court distinguished this case from *Scarpa v. Murphy, supra, and Sanchez v. Bd. of Regents of Texas Southern Univ., supra. Id.* at 431. The court ultimately agreed with the district court's conclusion that counsel could not demonstrate that his failure to file timely notice was attributable to circumstances entirely beyond his control, nor that counsel had offered sufficient evidence of mailing to entitle him to the presumption that notice was indeed delivered.

The sole court that has held that good faith reliance on the U.S. Postal system does not constitute excusable neglect under F.R.A.P. 4(a)(5) is the Federal Circuit Court. In *Penrod Drilling Co. v. United States*, 925 F.2d 406 (Fed. Cir. 1992), the principal case relied on by the district court in the instant case, the appellant elected to send the pleading by regular mail rather than certified mail, as required by the rules of the Court of International Trade, and the appellee never received notice, which was necessary in order to perfect filing under the Court rules. In evaluating the appellant's allotment of two days for mailing from Washington D.C. to New York, the court noted that it was a virtual certainty that the notice would not arrive in time. *Id.* at 408. The court concluded that a party who elects to send its notice by regular mail assumes the risk of possible delay and that in this jurisdiction,

henceforth, postal delays would not constitute excusable neglect under F.R.A.P. 4(a)(5).

One of the principal reasons for treating appellate filing deadlines so rigidly is the "need for the prevailing party to know, at a fixed time, how the litigation stands." *In re OPM Leasing Services, Inc.*, 769 F.2d 911, 916 (2d Cir. 1985). In this case, however, it is *undisputed* that Hewlett-Packard received the Notice of Appeal two days *before* the deadline for filing the Notice, and thus, had more than adequate notice of Ms. Witty's intent to appeal. Only the district court did not receive (or at least did not docket) the Notice before the deadline. The Notice was one day late and Ms. Witty moved immediately for relief. These facts are undisputed and the district court did not question them--it simply ignored them. Failure to consider such factors is error. *See Consolidated Freightways Corp. v. Larson*, 827 F.2d 916, 920 (3rd Cir. 1987), *cert. denied*, 108 S.Ct. 762 (1988) (where delay from misdirected notice of appeal was minimal, not the result of bad faith, and notice was timely served on appellee, there was no prejudice, and judicial interest in deciding cases on the merits outweighs interest in finality).

Uniform interpretation of the "excusable neglect" standard under F.R.A.P. 4(a)(5) is of crucial importance to appellant litigants particularly in this era of multi-district litigation where litigants must rely on the postal system. The majority of courts would have granted Ms. Witty an extension of time under F.R.A.P. 4(a)(5)'s excusable neglect standard. And, upon closer inspection, even the factors considered in *Penrod*, the sole conflicting circuit

authority, support a finding of excusable neglect under the facts of this case. Here, Ms. Witty's counsel allotted *four* full days for the notice to be delivered within the same metropolitan area. The district court ignored this undisputed evidence, including a statement from the U.S. Postal Service indicating a 95% certainty that her notice would arrive not only on time, but within 24 hours. It was not foreseeable and not inexcusable, for Ms. Witty to expect mail to reach its destination less than two miles away within a four day period. Furthermore, it is undisputed that Hewlett-Packard's counsel received the notice of appeal two days before the deadline. It is also undisputed that immediately upon learning of the delay, only one day after the notice had been docketed, counsel for Ms. Witty promptly moved for an extension of time.

As in *Ramseur*, due to only a single day's delay in the receipt of notice and Hewlett-Packard's actual and timely notice of the appeal, no fairness concerns are raised. Also as in *Ramseur*, the delay was not attributable to counsel's bad faith. Rather, Ms. Witty's notice was untimely despite counsel's diligent efforts at compliance. Based upon normal delivery in the downtown Denver metro area, counsel reasonably believed that the notice would be filed within the 30-day time period.[4]

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[4] In its order, the district court states that petitioner could have used a messenger service to deliver the notice. Please see Ms. Witty's second reason for granting the writ, *infra*, for a detailed discussion of the potential repercussions of this statement.

Applying the Court's standards as delineated in *Pioneer Inv. Services*, the facts of this case mandate a finding of excusable neglect because: the notice was docketed one business day after the deadline, therefore there was no adverse effect on appellate proceedings; appellee received actual notice before the deadline, thus no prejudice was suffered; the unexplainable delay in the delivery of mail was beyond Ms. Witty's control; and Ms. Witty acted in good faith, both in her reliance on the mail system, and in her expeditious attempt to promptly rectify the matter upon discovery of the delay. *See Pioneer Inv. Services*, 113 S.Ct. at 1498.

II.

The Tenth Circuit's affirmance of the District Court's application of the Rule 4(a)(5) of the Federal Rules of Appellate Procedure "excusable neglect" standard is tantamount to a unilateral creation of a local rule which requires hand delivery of all pleadings.

Neither the Federal Rules of Appellate Procedure, the Tenth Circuit Local Rules, nor the Local Rules for the District Court contain any prohibition against filings by mail, nor any mandate that filing must be accomplished by hand delivery. See F.R.A.P. 25(a) (notice of appeal timely upon receipt); D.C. Colo. L.R. 4.4 (notice of appeal filed when received): D.C. Colo. L.R. 5.1(H) (prohibiting filing by facsimile machine). Nevertheless, that is the effect of the court's decision in this case.

The court's ruling, under the circumstances of this case, amounts to a new local *per se* rule modifying F.R.A.P. 4(a)(5), that mail delays are foreseeable and cannot be deemed excusable neglect under *any* circumstances. This is so regardless of how brief the delay (one day), how prompt the corrective action (immediate), the length of lead time allowed for delivery (more than twice the expected time); the mailing distance (less than two miles); and perhaps most significant, whether the primary purpose of timely filing--prompt notice to the appellee--has been accomplished.

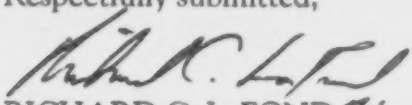
Allowing the district court's decision to stand essentially precludes any form of reliance by parties on the U.S. Postal Service in delivering pleadings under *any* circumstances, except where a rule specifically provides that filing is complete upon mailing. See, e.g., F.R.A.P. 25(a) (briefs and appendices). The practical effect of this order is that parties will only be considered to have acted in diligent good faith by hand-delivering documents to the clerk for filing. However, as the decision in this matter was not selected for publication, litigants will continue to rely on the U.S. Postal Service for filing. Even with the precaution of allowing more than twice the expected delivery time, and even though opposing counsel receives the pleading in a timely fashion, the consequence of a delayed delivery to the court is an *irrevocable* loss of jurisdiction. The Tenth Circuit ruling has so eroded the concept of "excusable neglect" that the remedy of F.R.A.P. 4(a)(5) is no longer available in this Circuit.

A district court is not free to unilaterally fashion its own local rules, particularly when such rules conflict squarely with analogous applications of Federal Rules by this Court and the majority of the Circuit Courts of Appeals. To do so invites inconsistency, unfairness and an unbalanced administration of justice. Furthermore, modifying rules in an unpublished decision deprives future litigants of adequate notice. In relying on the U.S. Postal Service and even allowing ample extra time for delivery, Ms. Witty made good faith efforts to comply with the rules and had no notice that, despite advance mailing and timely receipt by the appellee, and despite voluminous authority, there would be no recourse available to her under F.R.A.P. 4(a)(5) if postal delivery to the court was delayed.

CONCLUSION

Despite Ms. Witty's diligent pursuit of her appeal, through circumstances beyond her control, the notice of appeal was not docketed until one day after the deadline. No parties would have been prejudiced by a *nunc pro tunc* granting of an additional day in which to file the notice of appeal. Furthermore, the circumstances accord with those that F.R.A.P. 4(a)(5) was designed to protect. This Court, the majority of the Circuit Courts of Appeals, and F.R.A.P. 4(a)(5) itself are irreconcilable with a bright-line view that erects a rigid barrier against late filings attributable to circumstances beyond the appellant's control. *See Pioneer Inv. Services*, 113 S.Ct. at 1498, n.14. Under applicable governing standards, the facts of Ms. Witty's case clearly support a finding of excusable neglect. In determining whether mail delay is excusable, this Court should adopt and reiterate a flexible approach that considers the above-enumerated factors. For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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August 4, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CAROL WITTY,
Plaintiff - Appellant,

v. Nos. 93-1438
94-1035

HEWLETT-PACKARD COLORADO INC.,
also known as Hewlett Packard, a California corporation,
Defendant - Appellee.

ORDER
entered May 9, 1995

Before MOORE and BRORBY, Circuit Judges, and ALSOP, Senior District Judge . *

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*The Honorable Donald D. Alsop, Senior Judge of the United States District Court for the District of Minnesota, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc. Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

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rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

_____

Deputy Clerk

UNITED STATES COURT OF APPEALS .
TENTH CIRCUIT

CAROL WITTY,
Plaintiff-Appellant

No. 93-1438, 94-1035
v. (D.C. No. 92-S-1105)
(D. Colo.)

HEWLETT PACKARD COLORADO, INC., aka Hewlett-Packard, a California corporation
Defendant-Appellee

ORDER AND JUDGMENT*

Before MOORE and BRORBY, Circuit Judges, and ALSOP, Senior District Judge.**

Witty appeals two orders of the United States District Court for the District of Colorado. Because the district court did not abuse its discretion by denying Witty's motion for

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

**The Honorable Donald D. Alsop, Senior Judge of the United States District Court for the District of Minnesota, sitting by designation.

an extension of time within which to file an appeal, we affirm in Appeal No. 94-1035. Therefore, we do not have jurisdiction to review Appeal No. 93-1438.

Witty brought a seven count action against Hewlett-Packard alleging breach of contract, malicious breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, wrongful termination based on the public policy exception, outrageous conduct, and fraudulent misrepresentation. On September 27, 1993, the district court granted summary judgment in favor of Hewlett-Packard on all counts. The court entered judgment on September 29, 1993. On November 1, 1993, Witty filed an untimely notice of appeal challenging the grant of summary judgment (Appeal No. 93-1438). Because her appeal was untimely, Witty filed with the district court a motion for an extension of time within which to file her notice of appeal. On November 8, 1993, the district court denied this motion. Next, Witty filed a motion for reconsideration of her motion for an extension of time. On December 14,1993, the district court granted the motion for reconsideration, but denied Witty's motion for an extension. On January 13, 1994, Witty appealed the district court's denial of her motion for an extension of time (Appeal No. 94-1035).

Because Witty's initial notice of appeal was not filed within the thirty day deadline, we do not have jurisdiction to hear the merits of this case (Appeal No. 93-1438) unless we

determine the district court abused its discretion by denying Witty's motion for an extension of time within which to file an appeal (Appeal No. 94-1035). See Romero v. Peterson, 930 F.2d1502, 1505 (10th Cir. 1991). Rule 4(a)(5) of the Federal Rules of Appellate Procedure provides that a district court, upon a showing of excusable neglect, may extend the time for filing a notice of appeal. "[The time for taking an appeal should not be extended [by the district court] in the absence of circumstances that are unique or extraordinary.'" Gooch v. Skelly Oil Co., 493 F.2d 366, 370 (10th Cir. 1974), cert. denied. 419 U.S. 997 (1974).

The district court found it was not excusable neglect for Witty to rely on the United States mail to deliver her notice of appeal within four days. The district court, therefore, denied Witty's motion for an extension of time within which to file an appeal. A district court's order denying a motion for an extension of time in which to file a notice of appeal is reviewed for a clear abuse of discretion. See Romero v. Peterson, 930 F.2d 1502, 1505 (10th Cir. 1991). Witty cites several cases standing for the proposition it is excusable neglect to rely on the United States Postal Service to deliver mail in a timely fashion. See. e.g., Tarabishi v. McAlester Regional Hosp., 951 F.2d 1558 (10th Cir. 1991), cert. denied. 112 S.Ct. 2996 (1992). Other courts, however, have ruled delays in United States mail service are foreseeable. See. e.g., Penrod Drilling Co. v. U.S.. 925 F.2d 406, 408 (Fed.Cir. 1991). Although this Court may have

reached a contrary result, it is clear the district court's decision was not an abuse of discretion.

We AFFIRM the district court in Appeal No. 94-1035. In view of our disposition of Appeal No. 94-1035, the appeal in 93-1438 is DISMISSED for want of jurisdiction.

Entered for the Court

Donald D. Alsop
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 92-S-1105
CAROL WITTY,
Plaintiff,
v.

HEWLETT PACKARD CORPORATION, INC., a/k/a HEWLETT PACKARD, a California corporation,
Defendant.

ORDER

THIS MATTER comes before the court on the Plaintiff's Motion to Reconsider, filed November 18, 1993. The Plaintiff seeks reconsideration of the court's November 8, 1993 Order denying the Plaintiff's request for an extension of time to file her Notice of Appeal. The court has reviewed the motion, the Defendant's response, and the applicable law and is sufficiently advised in the premises.

The timely filing of a notice of appeal is mandatory and jurisdictional. Notes of Advisory Committee on Appellate Rules to Fed. R. App. P. 3. Fed. R. App. P. 4(a)(l) requires that a notice appeal in a civil case be filed with the clerk of the district court within 30 days after the entry of the judgment or order appealed from. It is undisputed that Plaintiff's Notice of Appeal was filed at least one day late.

> Fed. R. App.P. 4(a)(5) provides:
>
> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

The grant or denial of a motion to extend time for filing a notice of appeal is discretionary with the court. Penrod Drilling Co. v. United States, 925 F.2d 406, 408 (Fed. Cir. 1991). "Excusable neglect" is the appropriate standard in this case. See Redfield v. Continental Casualty Corp., 818 F.2d 596, 601 (7th Cir. 1987). The words "excusable neglect" must be strictly construed for

purposes of Rule 4. In Re OPM Leasing Services. Inc., 769 F.2d 911, 916 (2d Cir. 1985). The excusable neglect standard requires a case-by-case analysis and a thoughtful weighing and balancing of numerous factors. A finding of "excusable neglect" may not be based on common oversight or administrative failure by Plaintiff's counsel, as the thirty-day rule of Rule 4(a)(1) is mandatory and should be rigidly enforced. 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 767 (2d Cir. 1988).

First, the court does not perceive and the Plaintiff does not present any evidence of "excusable neglect" which would excuse the pre-mailing delay. See Wright v. Deyton, 757 F.2d 1253, 1255-6 (11th Cir. 1985). The Plaintiff cannot sit idly by and allow her filing deadline to approach and then argue that compliance with the deadline should be excused because the notice of appeal was posted in sufficient time to meet the deadline if the mail had followed its ordinary course. Wright, 757 F.2d at 1255 n. 5.

Second, uncontrollable delays in the delivery of mail are readily foreseeable consequences for which counsel should provide. See Penrod, 925 F.2d at 409. The notice of appeal was mailed too close to the deadline for the clerk of the Court of Appeals to receive the document in the ordinary course of events by October 28, 1993. See Redfield, 818 F.2d at 602.The court cannot find that the Plaintiff's conduct when facing an impending deadline as important as this one was excusable neglect..

After examining and reconsidering the appropriate factors in relation to the circumstances of this case, the court concludes that its November 8, 1990 Order denying

the Plaintiff's motion for an extension of time in which to file her notice of appeal should stand.

The court now being sufficiently advised,

IT IS ORDERED that the Plaintiff's Motion for Reconsideration is GRANTED. Upon reconsideration,

IT IS FURTHER ORDERED that the court's November 8, 1993 Order denying the Plaintiff's motion for an extension of time in which to file her notice of appeal shall stand.

DATED at Denver, Colorado, this 14th day of December, 1993.

BY THE COURT:

Daniel B. Sparr
United States District Judge

Case No. 92-S-1105

CERTIFICATE OF MAILING

I hereby certify that a copy of the ORDER signed by Judge Daniel B. Sparr and filed on December 14, 1993, was mailed on December 14, 1993, to the following:

Richard C. LaFond, Esq.
Penny Hypsher, Esq.
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Denver,CO 80218

JoAnn Juskie, Esq.
Gibson, Dunn & Crutcher
1801 California Street, Suite 4200
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Gibson, Dunn & Crutcher
4 Park Plaza, Suite 1700
Irvine, CA 92714-8577

Magistrate Judge O. Edward Schlatter

Secretary/Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 92-S-1105

CAROL WITTY,
Plaintiff,
v.

Hewlett-Packard CORPORATION, INC., a/k/a
HEWLETT PACKARD, a California corporation,
Defendant.

ORDER

THIS MATTER comes before the court on the Plaintiff's Motion for Extension of Time to File Appeal, filed November 1, 1993. Without the benefit of any response, the court has reviewed the motion, the entire case file, and the applicable law and is sufficiently advised in the premises.

The timely filing of a notice of appeal is mandatory and jurisdictional. Notes of Advisory Committee on Appellate Rules to FRAP 3. Fed. R. App. P. 4(a)(1) requires that a notice of appeal in a civil case, other than one to which the United States or an officer or agency thereof is a party, be filed with the clerk of the district court within 30 days after the entry of the judgment or order appealed from. Because the judgment dismissing this case was entered September 28, 1993, the Plaintiff should have filed her notice of appeal

no later than October 28, 1993. In fact, the Plaintiff's notice was not filed until November 1, 1993. The Plaintiff explains that she was not able to ascertain whether she could secure adequate funding to pursue an appeal until October 25, 1993. She notified her counsel on October 25, 1993 that she desired to pursue the appeal. Plaintiff's counsel placed the notice of appeal in the U.S. Mail on October 25, 1993, three days before the October 28, 1993 deadline. Plaintiff's counsel telephoned the Court of Appeals on November 1, 1993 and were informed that the appeal had been docketed after the deadline, on November 1, 1993. As soon as the Plaintiff became aware that the appeal had been docketed after the deadline, she filed this motion in the district court requesting an extension of time within

which to file her notice of appeal pursuant to Fed. R. App. P. 4(a)(5).

Fed. R. App. P. 4(a)(5) provides:

> The district court, upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this rule 4(a).

"Excusable neglect" is the appropriate standard for granting additional time to file a notice of appeal pursuant to Rule 4(a)(5) in cases (like this case) in which the motion is made after the time for filing the notice of appeal has run, while "good cause" is the appropriate standard in cases in which the appellant seeks an extension of time before the expiration of the initial 30-day period. Redfield v. Continental Casualty Corp., 818 F.2d 596, 601 (7th Cir. 1987). The words "excusable neglect" must be strictly construed for purposes of Rule 4. In Re OPM Leasing Services. Inc., 769 F.2d 911, 916(2d Cir. 1985). The excusable neglect standard requires a case-by case analysis and a thoughtful analysis will, at a minimum, require the weighing and balancing of whether: (1) the inadvertence reflects professional incompetence such as ignorance of the rules of procedure; (2) the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) the tardiness results from counsel's failure to provide for a readily foreseeable consequence; (4) the inadvertence reflects a complete lack of diligence; (5) the court is satisfied that the inadvertence resulted despite counsel's substantial good faith efforts toward compliance.

Consolidated Freightways Corp.. v. Larson, 827 F.2d 916, 919 (3d Cir. 1987), cert. denied 484 U.S. 1032 (1988) (citations omitted). Excusable neglect will generally be found where: (1) a party in good faith relied on the actions and representations of the district court or its officers and consequently failed to file a timely appeal; (2) the party failed to learn of the entry of judgment; (3) there were uncontrollable delays in the delivery of mail; (4) there were unpredictable events that delay the delivery of the notice of appeal to the clerk or unpredictable

events that affect the feasibility of appeal; and (5) there were plausible misconstructions, but not mere ignorance, of the law or rules. Redfield, 818 F.2d at 602. A finding of "excusable neglect" may not be based on common oversight or administrative failure by Plaintiff's counsel, as the thirty-day rule of Rule 4(a)(1) is mandatory and should be rigidly enforced. 650 Park Ave. Corp. v. McRae, 836 F.2d 764, 767 (2d Cir. 1988).

In determining whether to extend the time for filing an appeal on the basis that the notice of appeal was unduly delayed in the mail, the inquiry should focus on two distinct periods. Wright v. Deyton, 757 F.2d 1253, 1255-56 (11th Cir. 1985). First, the district court should examine the pre-mailing delay to see if there is something akin to "excusable neglect" which excuses the delay. Second, the district court should determine when the document was mailed and whether, in the ordinary course of events, the clerk of the Court of Appeals would have received the document by the applicable filing deadline. Wright, 757 F.2d at 1255-56. A litigant cannot sit idly by and allow her filing deadline to approach and then argue that compliance with the deadline should be excused because the notice of appeal was posted in sufficient time to meet the deadline if the mail had followed its ordinary course. Wright, 757 F.2d at 1255 n. 5.

First, the court finds that the notice of appeal was docketed two days late, not one day late as the Plaintiff asserts. After examining the appropriate factors extensively, the court concludes that the Plaintiff's motion for an

extension of time in which to file her notice of appeal should be denied.

In examining the pre-mailing delay, the court finds nothing akin to "excusable neglect." The Plaintiff did not notify her counsel of her decision to appeal until October 25, 1993. The notice was then mailed so close to the deadline that it cannot be said that in the ordinary course of events the clerk of the Court of Appeals would have received the document by October 28, 1993.Plaintiff's counsel's office is at 1756 Gilpin Street in Denver, not far enough from the U.S Courthouse to Prevent hand-delivery

in a situation of an impending deadline. Many documents are hand delivered by law firm personnel or by messenger service to the U.S. Courthouse every day.

The court now being sufficiently advised,

IT IS ORDERED that the Plaintiff's Motion for Extension of Time to File Appeal is DENIED.

DATED at Denver, Colorado, this 8th day of November, 1993.

BY THE COURT

Daniel B. Sparr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION: 92-S-1105

CAROL WITTY,
Plaintiff,

v.

HEWLETT-PACKARD COLORADO, INC., a/k/a Hewlett-Packard, a California corporation,
Defendant.

JUDGMENT

This matter was before the Court on defendants motion for summary judgment. The Court having heard the oral arguments and comments of counsel referenced herein as if fully set forth it is

ORDERED that judgment is hereby entered in favor of defendant Hewlett-Packard Colorado, Inc., and against plaintiff Carol Witty on all claims of defendant's motion for summary judgment. It is FURTHER ORDERED that this action and complaint are hereby dismissed. It is

FURTHER ORDERED that each party to bear its own costs. Dated at Denver, Colorado this 28th day of September, 1993.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK
Stephen P. Ehrlich, Chief Deputy